



City of NORFOLK

To the Honorable Council
City of Norfolk, Virginia

March 25, 2014

From: Steven J. Anderson
Director Department of Development

Reviewed: Ronald H. Williams Jr., Assistant City
Manager *R.H. Williams Jr.*

Subject: Encroachment Agreement
for Outdoor Dining – 1421 Colley
Avenue – The Max DLC LLC
Ward/Superward: 2/6

Approved: *Marcus D. Jones*

Marcus D. Jones, City Manager

Item Number: R-3

I. **Recommendation:** Adopt Ordinance

II. **Applicant:** The Max DLC LLC
1421 Colley Avenue
Norfolk, VA 23517

III. **Description:**

The Encroachment Agreement will permit The Max DLC LLC to continue to operate with an existing outdoor dining encroachment in the right-of-way at 1421 Colley Avenue.

IV. **Analysis**

An encroachment is an object or structure that infringes into the City of Norfolk's right-of-way or property. Norfolk City Code, Section 42-10, requires all encroachments into City rights-of-way and properties to be approved by City Council.

This Encroachment Agreement will permit The Max DLC LLC to encroach approximately 387 square feet into City of Norfolk right-of-way. The term of the encroachment is no longer than five (5) years, commencing upon the effective date of the ordinance and expiring five (5) years thereafter.

Hours of Operation	Outdoor Seating Capacity
Mon-Friday 3:00 PM - 2:00 AM	32
Saturday: 8:30 AM – 2:00 AM	
Sunday: 8:30 AM – 12:00 AM	

V. Financial Impact

The applicant will pay the City an annual rent in the amount of \$2,322.00, paid in monthly installments of \$193.50.

VI. Environmental

There are no known environmental issues associated with this encroachment.

VII. Community Outreach/Notification

Public notification for this agenda item was conducted through the City of Norfolk's agenda notification process.

VIII. Board/Commission Action

The outdoor dining request was approved by the Design Review Committee on June 6, 1997.

IX. Coordination/Outreach

This letter has been coordinated with Department of Economic Development and the City Attorney's Office.

Supporting Material from the City Attorney's Office:


- Ordinance
- Encroachment Agreement

2/28/14mr

Form and Correctness Approved: 

By 
Office of the City Attorney

Contents Approved:

By 
DEPT.

NORFOLK, VIRGINIA

ORDINANCE No.

AN ORDINANCE GRANTING PERMISSION TO DLC, L.L.C. T/A THE MAX TO ENCROACH INTO THE RIGHT-OF-WAY OF COLLEY AVENUE AT 1421 COLLEY AVENUE WITH AN AREA MEASURING 9 FEET BY 43 FEET BY 8 INCHES DIRECTLY IN FRONT OF THE MAX RESTAURANT FOR THE PURPOSE OF PROVIDING FACILITIES FOR OUTDOOR DINING.

- - -

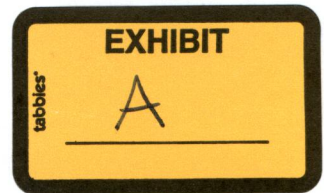
BE IT ORDAINED by the Council of the City of Norfolk:

Section 1:- That permission is hereby granted to DLC, L.L.C. t/a The Max to encroach into the right-of-way of Colley Avenue at 1421 Colley Avenue with an area measuring 9 feet by 43 feet by 8 inches directly in front of The Max restaurant for the purpose of providing facilities for outdoor dining in accordance with the terms and conditions of the Encroachment Agreement, a copy of which is attached to and made a part hereof as Exhibit A.

Section 2:- That the City Manager or other proper officers of the City are authorized to execute said Encroachment Agreement on behalf of the City.

Section 3:- That the City Manager is further authorized to correct, revise or amend the Encroachment Agreement as he may deem advisable to carry out the intentions of the Council.

Section 4:- That this ordinance shall be in effect from and after its adoption.



ENCROACHMENT AGREEMENT

This **ENCROACHMENT AGREEMENT** (hereinafter "Agreement") is made and entered into this _____ day of February 2014, by and between the **CITY OF NORFOLK**, a municipal corporation of the Commonwealth of Virginia (hereinafter "City"), and **DLC, L.L.C., T/A THE MAX** (hereinafter "Max").

WITNESSETH:

1. **ENCROACHMENT AREA.** City hereby grants permission to Max to encroach into the right of way of Colley Avenue, at 1421 Colley Avenue, with an area measuring 9 feet by 43 feet by 8 inches directly in front of The Max restaurant, as shown on Exhibit A attached hereto ("Encroachment Area"), for the purpose of outdoor dining and no other purpose.

2. **USE.** Max shall be permitted to occupy the Encroachment Area for outdoor dining in conjunction with the operation of The Max Restaurant located at 1421 Colley Avenue, Norfolk, Virginia.

3. **TERM; TERMINATION.** The term of the permission to encroach granted hereby shall be no longer than five (5) years and shall commence on February 1, 2014, or upon the effective date of any authorizing ordinance, whichever shall last occur, and shall terminate on January 31, 2019. However, it is expressly understood that the permission granted hereby is expressly subject to the right of revocation by the Norfolk City Council, and that in the event of such revocation, Max, or its successors or assigns, if requested by City, shall remove the encroaching structures and shall cease using the Encroachment Area.

4. **COMPENSATION.** As compensation for the privilege of encroaching into the right of way, Max shall pay City annual rent in the amount of \$2,322.00 annually based on a rental rate of \$6.00 per square foot (387 sq. ft.) of the Encroachment Area, and such rent to be paid in monthly installments of \$193.50 on or before the first day of each month. The rent shall be paid by check payable to the Norfolk City Treasurer and sent to the Department of

Development, 500 E. Main Street, Suite 1500, Norfolk, Virginia 23510, and Attn: Division of Real Estate.

5. **LATE FEES.** For any late payments received 5 days after the first of each month, Max shall pay a late fee of five percent (5%) of the amount not paid when due.

6. **UTILITIES.** City shall not be responsible for utilities of any type used within the Encroachment Area. Max shall pay all utility meter and utility services charges for all utilities, including but not limited to gas, electricity, water, telephone, sewer, and any other necessary to serve the Encroachment Area.

7. **REPAIRS.** Max shall keep and maintain the Encroachment Area in good and complete state of repair and condition. Max shall make all repairs and replacements of every kind to the sidewalks and paved areas of the Encroachment Area in order to preserve and maintain the condition of the Encroachment Area. All such repairs and maintenance shall be performed in a good and workmanlike manner, be at least equal in quality and usefulness to the original components, and not diminish the overall value of the Encroachment Area.

8. **REQUIREMENTS OF PUBLIC LAWS.** Max shall suffer no waste or injury to the Encroachment Area and shall comply with all federal, state and municipal laws, ordinances and regulations applicable to the structure, use and occupancy of the Encroachment Area. In addition, Max shall effect the correction, prevention and abatement of nuisances, violations or other grievances in, upon or connected with the Encroachment Area.

9. **CITY'S RIGHT TO ENTER AND CURE.** City shall retain the right to enter upon the Encroachment Area at any time for the purpose of inspecting the Encroachment Area, ascertaining compliance with this Agreement, and making any repairs which City deems necessary as a consequence of any failure of Max to meet their obligations under this Agreement. The cost of any such repairs shall be deemed additional compensation payable to the City on

demand. Any entry upon the Encroachment Area or cure and repair shall be accomplished by City at reasonable times and in the exercise of reasonable discretion by the City. The making of any repairs by City shall not constitute a waiver by City of any right or remedy upon Max default in making repairs.

10. **NOTICE.** Any notice shall be in writing and shall be delivered by hand or sent by United States Registered or Certified Mail, postage prepaid, addressed as follows:

City: Department of Development
500 E. Main Street, Suite 1500
Norfolk, Virginia 23510
Attn: Division of Real Estate

Max: DLC, L.L.C. t/a The Max
1421 Colley Avenue
Norfolk, VA 23517

With copies to:

City Attorney
900 City Hall Building
810 Union Street
Norfolk, Virginia 23510

Either party hereto may change its address to which said notice shall be delivered or mailed by giving notice of such change as provided above. Notice shall be deemed given when delivered (if delivered by hand) or when postmarked (if sent properly by mail).

11. **ENVIRONMENTAL MATTERS.** Max agrees that it will not introduce onto the Encroachment Area any toxic, hazardous or dangerous materials unless such material is stored, safeguarded, or used in accordance with applicable laws and regulations. Max will not allow any air, water or noise pollution to occur in the Encroachment Area. Max hereby agrees to use and occupy the Encroachment Area in a safe and reasonable manner and in accordance with applicable law.

City in turn agrees that Max shall not be responsible or assume liability for environmental conditions existing on or about the Encroachment Area prior to Max's occupancy thereof under this Agreement.

12. **DESTRUCTION.** If the encroaching structures or any part thereof shall be damaged or destroyed by fire, lightning, vandalism, or by any other casualty or cause, the permission granted hereby shall be automatically terminated unless the parties agree, in writing, to continue to permit the encroachments granted by this Agreement.

13. **NON-LIABILITY OF CITY.** City shall not be liable for any damage or injury which may be sustained by Max or any other person as a consequence of the failure, breakage, leakage or obstruction of the water, plumbing, steam, gas, sewer, waste or spoil pipes, roof, drains, leaders, gutters, valleys, downspouts or the like, or of the electrical, ventilation, air conditioning, gas, power, conveyor, refrigeration, sprinkler, heating or other systems, elevators or hoisting equipment, if any, upon the Encroachment Area, or by reason of the elements; or resulting from acts, conduct or omissions on the part of Max, or their agents, employees, guests, licensees, invitees, assignees or successors, or on the part of any other person or entity.

14. **REMOVAL OF SNOW.** Max agrees to remove or cause to be removed, as the need for the same arises, snow and ice from the Encroachment Area.

15. **ALTERATIONS.** Max covenants and agrees that it will not make any improvements, changes installations, renovations, additions or alterations in and about the Encroachment Area without the prior written consent of the City other than the approval given by Norfolk's Planning Commission or subsequently approved modification to Encroachment Area. If Max installs or makes any improvements, additions, installations, renovations, changes on or to the Encroachment Area with the approval of City, Max hereby agrees to remove, if requested by City, any improvements, additions, installations, renovations, changes on or to the

Encroachment Area upon termination of this Agreement. In the event Max fails to remove and is requested to do so by City, then City may remove the improvements, additions, installations, renovations, changes and Max shall pay for the cost of such removal.

16. **ASSIGNMENT AND SUBLETTING.** City and Max agree that the permission to encroach granted hereby may not be assigned by Max without written approval from Norfolk's City Manager. City acknowledges that encroachment area is to be used for outdoor dining and the outdoor dining may be operated by an agent or lessee of Max.

17. **SURRENDER BY MAX.** Max will surrender possession of the Encroachment Area to City and remove all goods and chattels and other personal property therefrom upon termination of the permission granted hereby. Max shall return the Encroachment Area to the City in as good order and condition as it was at the beginning of Max's use of the Encroachment Area, reasonable wear and tear excepted. If Max has been requested to remove and fails to remove all items from the Encroachment Area upon termination hereof, City is authorized to remove and dispose of any such personal property and Max shall be liable to City for the cost of any removal and disposal.

18. **INSURANCE.** Max shall maintain in full force and effect a combined single limit policy of bodily injury, death and property damage insurance that coincides with the existing policy for Max of one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) aggregate insuring City and Max against all liability arising out of the use, occupancy, or maintenance of the Encroachment Area and appurtenant areas, which policy shall be endorsed as primary insurance in favor of City naming the City, its officers, employees, agents and representatives as additional named insured, as evidenced by a Certificate of Insurance provided to the City within thirty (30) days after adoption of this Agreement. All insurance policies and certificates shall provide for thirty (30) days advance notice in writing to:

Department of Development, 500 East Main Street, Suite 1500, Norfolk, VA, 23510, Attn: Division of Real Estate.

19. **FIXTURES.** City covenants and agrees that no part of the improvements constructed, erected or placed by Max in the Encroachment Area shall be or become, or be considered as being, affixed to or a part of the right of way, and any and all provisions and principles of law to the contrary notwithstanding, it being the specific intention of City and Max to covenant and agree that all improvements of every kind and nature constructed, erected or placed by Max in the Encroachment Area shall be and remain the property of Max.

20. **ENVIRONMENTAL COMPLIANCE.**

(a) For purposes of this section:

(i) "Hazardous Substances" include any pollutants, dangerous substances, toxic substances, hazardous wastes, hazardous materials or hazardous substances as defined in or pursuant to the Resource and Conservation Recovery Act (42 U.S.C. SS6901 et seq.) (IIRCRAII), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. SS9601 et seq.) (CERCLAII) or any other federal, state, or local environmental law, ordinance, rule or regulation.

(ii) "Release" means releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, disposing or dumping.

(iii) "Notice" means any summons, citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication, written or oral, actual or threatened, from any authority of the Commonwealth of Virginia, the United States Environmental Protection Agency (USEPAII) or other federal, state or local agency or authority, or any other entity or any individual, concerning any intentional act or omission resulting or which may result in the Release of Hazardous Substances into the waters or onto the

lands of the Commonwealth of Virginia, or into waters outside the jurisdiction of the Commonwealth of Virginia or into the "environment," as such terms are defined in CERCLA. "Notice" shall include the imposition of any lien on any real property, personal property or revenues of the Max, including but not limited to the Max's interest in the Leased Premises or any of Max's property located thereon, or any violation of federal, state or local environmental laws, ordinances, rules, regulations, governmental actions, orders or permits, or any knowledge, after due inquiry and investigation, or any facts which could give rise to any of the above.

(b) To the extent that Max may be permitted under applicable law to use the Encroachment Area for the generating, manufacture, refining, transporting, treatment, storage, handling, disposal, transfer or processing of Hazardous Substances, solid wastes or other dangerous or toxic substances, Max shall insure that said use shall be conducted at all times strictly in accordance with applicable statutes, ordinances and governmental rules and regulations. Max shall not cause or permit, as a result of any intentional or unintentional act or omission, a Release of Hazardous Substances in the Encroachment Area. If any such intentional or unintentional act or omission causes a Release of Hazardous Substance in the Encroachment Area, Max shall promptly clean up and remediate such Release in accordance with the applicable federal, state and local regulations and to the reasonable satisfaction of City.

(c) Max shall comply with all applicable federal, state and local environmental laws, ordinances, rules and regulations, and shall obtain and comply with any and all permits required thereunder or any successor or new environmental laws. Upon the receipt of any Notice, Max shall notify City promptly in writing, detailing all relevant facts and circumstances relating to the Notice.

(d) The requirements of this Section 20 shall apply to any successor in interest to Max, whether due to merger, sale of assets or other business combination or change of control.

(e) Max hereby agrees to defend (with counsel satisfactory to City) and indemnify and hold City harmless from and against any and all claims, losses, liabilities, damages and expenses (including, without limitation, reasonable cleanup costs and attorney's fees arising under this indemnity) which may arise directly or indirectly from any use or Release of Hazardous Substances in the Encroachment Area and losses and claims against City resulting from Max's failure to comply strictly with the provisions of this Section 20. The provisions of this Section 20 shall survive the termination of this permission granted by this Agreement.

21. **LIENS OR ENCUMBRANCES.** If because of any act or omission of Max, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against any portion of the Encroachment Area, Max shall, at its own cost and expense, cause the same to be discharged of record or bonded within ninety (90) days after written notice from the City to Max of the filing thereof, and Max shall have the right to contest the validity of such lien if it so chooses.

22. **APPLICABLE LAW.** The permission granted by this Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Any suit or legal proceeding relating to permission granted hereby shall be brought only in the state or federal courts located in the Eastern District of Virginia.

23. **WAIVER OF TRIAL BY JURY.** To the extent permitted by law, City and Max mutually waive their rights to trial by jury in any action, proceeding or counterclaim brought by either party against the other with respect to any dispute or claim arising out of the permission to encroach granted to Max by this agreement.

24. **OTHER REQUIREMENTS.**

(a) Max shall comply with the City of Norfolk's Downtown Outdoor Dining Policy.

(b) Max shall comply with all requirements of the City of Norfolk Department of Public Health with respect to the use of the Encroachment Area.

(c) The use of the Encroachment Area shall be subject to the jurisdiction and review of the City of Norfolk's Design Review Committee.

(d) Max's use of the Encroachment Area shall not interfere with any water meters or sewer cleanouts.

(e) A trash can compatible in design and style with the table and chairs will be provided for the outdoor dining, and trash shall be removed daily.

(f) Tables and chairs will be arranged according to plan approved by Norfolk's Design Review Committee, or subsequent approval if applicable.

25. **COMPLIANCE WITH FEDERAL IMMIGRATION LAW.** At all times during which any term of this Agreement is in effect, Contractor does not and shall not knowingly employ any unauthorized alien. For purposes of this section, an "unauthorized alien" shall mean any alien who is neither lawfully admitted for permanent residence in the United States nor authorized to be employed either by Title 8, Section 1324a of the United States Code or the U. S. Attorney General.

26. **DOMESTIC OR FOREIGN BUSINESS COMPLIANCE.** The Max, by executing this Agreement, certifies that it is authorized to transact business in Virginia as a domestic or foreign business entity as required by the State Corporation Commission, or as otherwise required by law. The Max further certifies that it will maintain such status during the term of this Agreement. This Agreement is voidable at the option of the City if, at the time The

Max entered into this Agreement, it was not authorized to transact business in Virginia as a domestic or foreign business entity; or, having qualified to enter into this Agreement fails to maintain such status during its term.

IN WITNESS WHEREOF, Parties have executed or have caused this Encroachment Agreement to be executed by their duly authorized officers and their corporate seals to be hereunto affixed and attested, all as of the day and year first above written.

THE CITY OF NORFOLK

By: _____
City Manager

ATTEST:

City Clerk

APPROVED AS TO CONTENTS:

Department of Development

FORM & CORRECTNESS APPROVED:

Deputy City Attorney

DLC, L.L.C. T/A THE MAX

By: _____
Title:

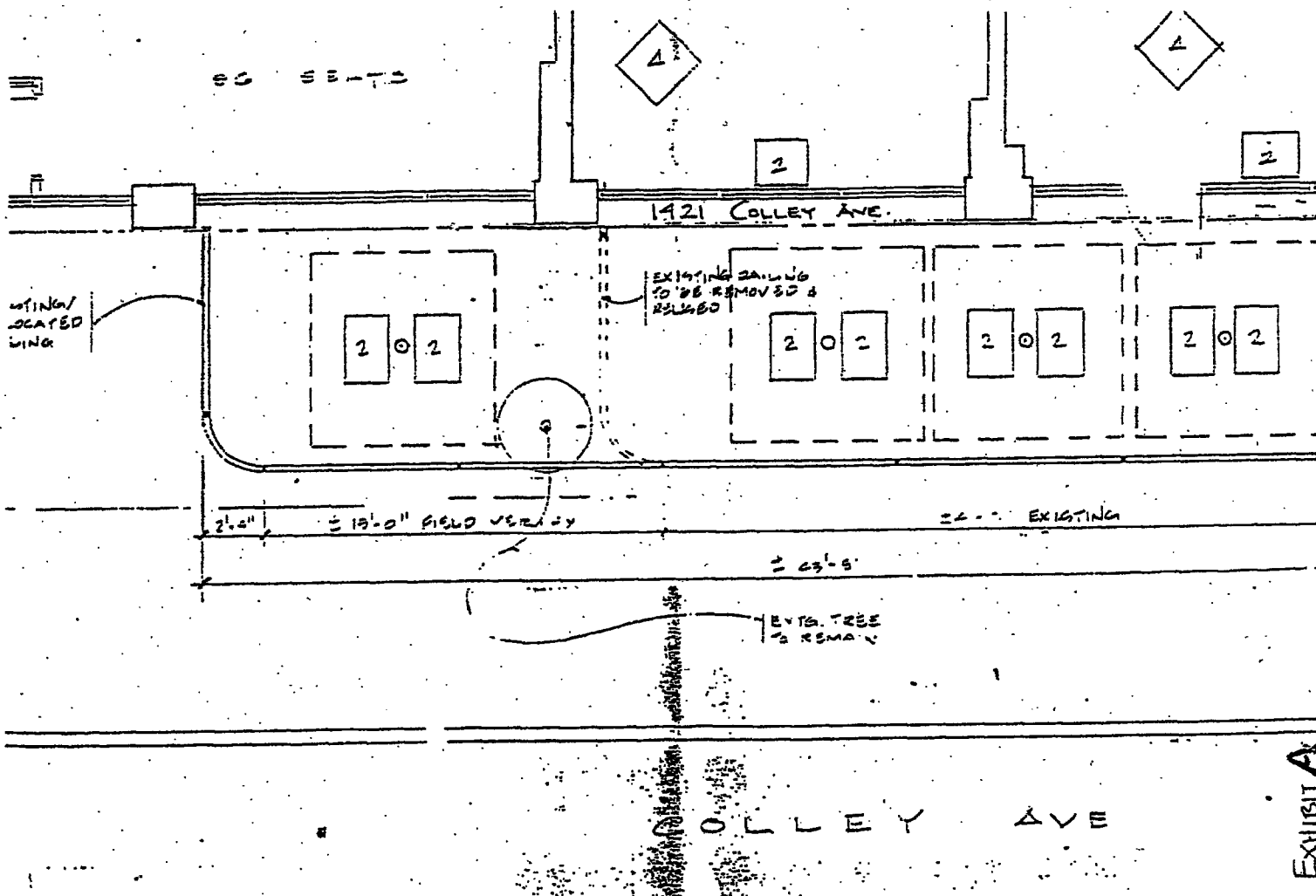


EXHIBIT A

